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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 70-248

GERARD A. HARRISON and HARRISON RANCH, INC.,
Petitioners,
vs.
CAREY PRATHER.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioners respectfully move this Court for an order vacating its denial of their Petition for Writ of Certiorari in the above cause entered October 12, 1971 and ask that this Court grant said petition.

The principal question presented by our petition for certiorari was whether the Court of Appeals erred in reversing this cause because of the charge given by the trial judge wherein he changed the article "the" to the letter "a" before the words "proximate cause".

We cited numerous decisions of the Third, Fourth, Fifth, Seventh and Eighth Circuits set out on pages eight, nine, ten, eleven, twelve, thirteen, fourteen and fifteen of our petition for certiorari which conflict with this decision of the Fifth Circuit which holds that the submission of interrogatories to the jury is governed by the decisions of the Mississippi courts. The cited decisions of said other circuit courts of appeal conflict with this decision of the Fifth Circuit by holding that the Federal rules concerning the court's charge, not the state practice, applies. Those courts hold the state practice is not applicable.

We did not cite, however, numerous other decisions of said other Circuit Courts of Appeal to the effect that in considering the validity of the trial court's charge, the whole charge should be considered and not merely one passage or part thereof. The Court of Appeals for the Fifth Circuit persists in holding that in determining the validity of the trial court's charge, the whole charge cannot be considered but only the particular passage objected to, which holding said court for the Fifth Circuit followed not only in this case but also in said court's decision of *Bender* v. *Dingwerth*, 425 F.2d 378 (5th Cir. 1970). These two decisions, that is the *Harrison* and *Bender* decisions, are completely contrary to the decisions of the First, Second, Third, Sixth, Eighth and Tenth Circuits which hold that the whole charge should be considered.

We did not cite these other decisions in our petition although such substantial ground for reversal and rendition was available to us but was not presented. We urge them

now in accordance with Sec. 2, Rule 58 SCR. Petitioners are referred to herein as plaintiffs and respondent as defendant.

The conflicting decisions we cited held that the submission of the case to the jury on interrogatories was governed by Federal decisions and rules and not by state decisions as held by the Fifth Circuit Court. The additional decisions rendered in said other Circuit Courts and cited in this motion hold that the entire charge should be considered and not merely a part thereof as the Fifth Circuit Court holds.

FIRST POINT

The jury found that the Prudential Insurance Company would have made the loan to the plaintiffs but that the defendant interfered with the loan, that defendant's interference was "a" proximate cause of Prudential not making the loan and such refusal caused the plaintiffs to suffer lost profits from their cattle operations in the amount of $86,352.00. The appellate court erred in holding that the use of the letter "a" in lieu of the article "the" before the words "proximate cause" by the trial judge was reversible error.

SECOND POINT

The jury found in answer to other interrogatories that the defendant personally or in conjunction with others acting in his behalf, wilfully and maliciously with the intent to harm or injure the plaintiffs, interfered with the granting of the loan by the Prudential Insurance Company to plaintiffs which proximately caused the plaintiffs' loss. Such a finding made that part of the charge involving the

use of the letter "a" in lieu of the article "the" by the trial court immaterial and the Court of Appeals for the Fifth Circuit erred in reversing and rendering said trial court judgment on such ground.

THIRD POINT

The Court of Appeals for the Fifth Circuit erred in requiring a jury finding that defendant's interference with the Prudential Insurance Company's loan to plaintiffs was the sole and only cause of Prudential not making the loan to plaintiffs when the jury found that Prudential would have made the loan to plaintiffs except for defendant's interference, which the jury found was willful and malicious, and done with intent to harm or injure plaintiffs and proximately resulted in lost profits to plaintiffs in the amount of $86,352.00.

STATEMENT, AUTHORITIES AND ARGUMENT UNDER FIRST, SECOND AND THIRD POINTS

In his opinion rendered in this case, *Harrison* v. *Prather*, 435 F.2d 1168, Circuit Judge Clark acknowledges that he followed the recent decision of *Bender* v. *Dingwerth*, 425 F.2d 378 (5th Cir. 1970). He quotes the rather effulgent language of Judge Goldberg in that case and belittles the ability of a lay jury to comprehend and correctly apply differences in the court's charge. It is apparent however that in this case the trial judge aided the jury by explaining his charge.

Furthermore there are conflicts in the holdings of the Fifth Circuit with reference to this question. Some recent decisions of that appellate court hold that the whole charge should be considered and not just a part thereof and that

when so considered the entire charge could cure errors therein, *Lyle* v. *R. N. Adams Const. Co.*, 402 F.2d 323 (C.A. Tex. 1968). In that decision the Fifth Circuit Court held:

> "The court's charge, with the sole exception of the one statement complained of, articulates the controlling issues in great detail. The charge must be read as a whole in order to determine whether the jury understood the basic issues to be decided.
>
> "Portions of a charge are not to be scrutinized on appeal apart from their context as isolated verbal phenomena. The charge on the contrary must on appeal be looked at as a whole.
>
> "Goodyear Fabric Corp. v. Hirss, 169 F.2d 115, 117 (1st Cir. 1948). See also Harris v. United States, 367 F.2d 633 (1st Cir. 1966); Charles A. Wright, Inc. v. F. D. Rich Co., 354 F.2d 710 (1st Cir. 1965). We do not read Dement v. Olin-Mathieson Chemical Corp., 282 F.2d 76 (5th Cir. 1960), cited by appellants, as authority to the contrary." (p. 327)

In addition to said decisions cited above from the First Circuit, that court has supported our contentions in various other decisions.

Recently the Second Circuit Court of Appeals made a similar ruling as is evidenced by the decision of *Nielsen* v. *Charles Kurz & Co.*, 295 F.2d 692, cert.den. 82 S.Ct. 1147, 369 U.S. 876 (C.A. N.Y. 1961).

Said Court of Appeals for the Second Circuit held in commenting upon this question as follows:

> "His chief attack is upon the judge's charge, various portions of which he wrenches from context to give an appearance of error. Viewed as a whole we think the charge appropriate. Doubtless the wording could have been improved here and there, but the general submission to the jury was fair." (pp. 692, 693)

See also *Rowe* v. *Pennsylvania Greyhound Lines, Inc.*, 231 F.2d 992, cert. den. 76 S.Ct. 1052 (C.A. N.Y. 1956). The Court of Appeals for the Third Circuit likewise supports our views. Its decisions conflict with the rules laid down by Justices Clark and Goldberg as is evidenced by such recent decisions as *Ely* v. *Reading Co.*, 424 F.2d 758 (C.A. Pa. 1970) and *McCarthy* v. *Kroger Co.*, 385 F.2d 150 (C.A. Pa. 1967). In the *Ely* decision, the court said:

> "In examining an alleged erroneous instruction to the jury, it is necessary to view the charge as a whole. It must be determined whether the charge 'taken as a whole, fairly and adequately submits the issues in the case to the jury.' When this standard is applied here, it is obvious that the charge as a whole adequately put in issue both the engineer's and Mr. Johnson's actions." (pp. 760, 761)

See also *Dostal* v. *Baltimore & O. R. Co.*, 189 F.2d 352 (C.A. Pa. 1951) and *Burch* v. *Reading Co.*, 240 F.2d 574, cert.den. 77 S.Ct. 1045 (C.A. Pa. 1957).

Likewise the Court of Appeals for the Sixth Circuit construes charges as a whole and refuses to reverse decisions when the whole charge was fair and proper. See *Louisville & N. R. Co.* v. *Farmer*, 220 F.2d 90, reh.den. 224 F.2d 599 (C.A. Tenn. 1955) and *Tyree* v. *N. Y. Cent. R. Co.*, 382 F.2d 524, cert.den. 88 S.Ct. 589 (C.A. Ohio 1967). In the *Tyree* decision it was contended that the court erroneously defined proximate cause but the court said:

> "Judge Martin, in speaking for this court, said in Spaeth v. United States, 232 F.2d 776, 777, C.A. 6, 'that a reviewing court should not pick out one erroneous paragraph of a long charge and reverse upon it, if, upon consideration of the entire charge, it appears that the jurors were correctly instructed as to the applicable law in such manner as to leave no confusion in their minds.' " (p. 527)

The Eighth Circuit Court of Appeals construes the whole charge together and not a small part thereof as is evidenced by the decision styled *Walton* v. *Eckhart,* 354 F.2d 35 (C.A. Iowa 1965), which held that although one instruction with respect to intervening efficient cause was not a complete definition in view of the fact that other instructions correctly stated the applicable law on the subject, reversal was not warranted. *Lowe* v. *Taylor Steel Products Co.,* 373 F.2d 65, cert.den. 88 S.Ct. 85 (C.A. Iowa 1967); *Jiffy Markets, Inc.* v. *Vogel,* 340 F.2d 495 (C.A. Mo. 1965), held that an erroneous instruction was harmless error when the charge considered as a whole was correct. See also *Turner County, S. D.* v. *Miller,* 170 F.2d 820, cert.den. 69 S.Ct. 656 (C.A. S.D. 1949).

The definition of "harmless error" is set out in Rule 61 FRCP as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Obviously the changing of "a" to "the" could not possibly affect the substantial rights of the parties when the trial court's charge is considered as a whole. *Apperwhite* v. *Illinois Cent. R. Co.,* 239 F.2d 306 (C.A. Mo. 1957).

The Tenth Circuit Court of Appeals will not reverse a decision because of an error in the charge if it correctly instructs the jury when the charge is considered as a whole, *Dyess* v. *W. W. Clyde & Co.,* 132 F.2d 972 (C.C.A. Utah

1943); *Krieger* v. *Bausch,* 377 F.2d 398 (C.A. Colo. 1967); *Lohr* v. *Tittle,* 275 F.2d 662 (C.A. Kan. 1960). The court in *Connecticut Fire Insurance Co.* v. *Fox,* 361 F.2d 1 (C.A. Wyo. 1966), held that the trial court's instructions to the jury must be considered as a whole and not piecemeal.

All the Federal court decisions in Mississippi do not follow these decisions of Judges Clark and Goldberg of which we complain. On the contrary the court held on various occasions that a jury charge shall not be read in fragments. In *McDaniel* v. *Slade,* 404 F.2d 607 (C.A. Miss. 1968), the court said:

> "A jury charge is comprehensive and ought not to be read in fragments. Our scrutiny of the district court's instructions must be orbitary and universal, not narrow and monocular. In the present instance the charge of the trial court, when viewed in its full context, fairly presented the law to the jury and is not rightfully subject to impugnment." (p. 609)

The Court of Appeals for the Fifth Circuit has held in several cases originating in Texas, in addition to the *Lyle* decision, supra, that the charge must be considered as a whole and should be viewed from the standpoint of the jury. *Garrett* v. *Campbell,* 360 F.2d 382 (C.A. Tex. 1966); *Grey* v. *First National Bank in Dallas,* 393 F.2d 371, cert. den. 89 S.Ct. 398 (C.A. Tex. 1968); *Forester* v. *Texas & P. Ry. Co.,* 338 F.2d 970 (C.A. Tex. 1964).

CONCLUSION

This decision is contrary to the great weight of authority in this country and indeed is contrary to recent decisions of the Fifth Circuit Court as is indicated above.

The finding of the jury that the Prudential Insurance Company would have made the loan except for the inter-

ference of the defendant which resulted in damage should be sufficient but in addition the jury went on to find that the defendant personally, or in conjunction with others, acting in his behalf wilfully and maliciously with intent to harm or injure plaintiffs interfered with the granting of a loan to them by Prudential Insurance Company which resulted in damages to plaintiffs in the amount of $86,352.00.

If this reversal because of the change of "a" to "the" in the court's charge is allowed to stand, it will not only result in great injustice but will lead to confusion as to the law applicable to this situation. The Fifth Circuit Court is promoting litigation, not terminating it.

This decision is not only grossly unjust but evidences a callous disregard for the law as found by other Federal appellate courts. We ask that the writ of certiorari be granted and that upon hearing thereof that said decision of the Court of Appeals be reversed and rendered and that the original judgment of the trial court in the amount of $88,802.00 with interest and costs as taxed by the trial court be affirmed, or, in the alternative that the judgment of the trial court in the amount of $45,626.00 with interest and costs as taxed by the trial court after the remittitur, be affirmed, and that petitioners be granted such other and further relief to which they may be entitled by virtue of the premises.

Respectfully submitted,

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Houston, Texas 77002
Attorney for Petitioners

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

FRED W. MOORE
Attorney for Petitioners

CERTIFICATE OF SERVICE

Copies of the above and foregoing petition for rehearing of this Court's order denying petitioners' petition for writ of certiorari, were mailed properly addressed to Mr. Philip Mansour, P. O. Box 773, Greenville, Mississippi, 38701, and Mr. Taylor Webb of the firm of Webb & Webb, 311 Broad Street, Leland, Mississippi, 38756, attorneys for respondent, this 29th day of October, 1971.

FRED W. MOORE
Attorney for Petitioners